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November 8, 1999

Christopher Wright
General Counsel
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

RE: Arguments Supporting Petition for Certiorari on Eligible Telecommunications Carrier Issues in *Texas Office of Public Utilities Counsel v. FCC*; *Ex parte* notice in CC Docket No. 96-45

Dear Mr. Wright:

I am writing on behalf of Western Wireless Corp. to follow up on our meeting with you last month regarding the Commission's consideration of whether to seek Supreme Court review of the Fifth Circuit's decision in *Texas Office of Public Utilities Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999). As you recall, Western Wireless believes that the Fifth Circuit erred in deciding that state commissions may impose eligible telecommunications carrier ("ETC") requirements in addition to those specified by Section 214(e)(2) of the Communications Act, 47 U.S.C. § 214(e)(2).

I am enclosing a memorandum describing the legal arguments for reversal of this aspect of the Fifth Circuit decision, and the reasons why the Supreme Court should grant *certiorari*. Please do not hesitate to contact me with any questions or to discuss this matter further.

Very truly yours,

David Sieradzki

David L. Sieradzki
Counsel for Western Wireless Corp.

Enclosure
cc: James Carr
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M E M O R A N D U M

November 8, 1999

TO: Christopher J. Wright, General Counsel
Federal Communications Commission

FROM: Western Wireless Corporation

RE: Bases for Seeking Certiorari on the ETC Designation Criteria Section of the Fifth Circuit Decision in *Texas OPUC v. FCC*

The FCC held, in *Federal-State Joint Board on Universal Service*, First Report and Order, 12 FCC Rcd 8776, 8851-55, ¶¶ 135-41 (1997), that 47 U.S.C. § 214(e)(2) unambiguously bars state commissions from imposing additional eligible telecommunications carrier ("ETC") criteria besides those specified by § 214(e)(1). The Fifth Circuit reversed this decision in Section III.A.2.a of *Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 417-18 (5th Cir. 1999) ("*Texas OPUC v. FCC*"). This memo discusses the grounds upon which the FCC could seek certiorari of section III.A.2.a of the Fifth Circuit's decision, including the bases for a petition for certiorari and the substantive grounds for reversal.

There are a number of important reasons for the Supreme Court to grant certiorari on this aspect of *Texas OPUC v. FCC*. First, the Fifth Circuit's decision misreads the plain meaning of the statute, which commands (in Section 214(e)(2)) that "a State commission shall . . . designate a common carrier that meets the requirements of paragraph (1) as an [ETC] for a service area designated by the State commission." A state would violate this express provision if it denies ETC status to an applicant who meets the (e)(1) requirements, but not additional state-imposed requirements. Moreover, to the extent that the statute is ambiguous on this point, the court violated the *Chevron* principle requiring deference to agency interpretations of ambiguous statutes by imposing its own interpretation rather than allowing the FCC to interpret its organic statute. As a consequence, the Fifth Circuit decision makes it possible, and even likely, that the 50 states will reach 50 different conclusions regarding which carriers are eligible for a *federal* subsidy administered by a *federal* agency under *federal* law. This is exactly the outcome that the FCC's reasonable statutory interpretation was designed to prevent.

Second, the Fifth Circuit's decision runs directly counter to the recent Supreme Court decision in *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366 (1999). In that case, the Court held that the 1996 Act creates a new relationship between federal

and state regulation of telecommunications. Thus, it found that the FCC has the power, under Section 2(b) of the Act, to interpret the statute and issue binding rules pursuant to it even with respect to local (*i.e.*, intrastate) telephony. The Fifth Circuit's decision on ETC designation, while purporting to sidestep the jurisdictional issue, actually overlooks the Supreme Court's fundamental holding in *AT&T v. Iowa Utils. Bd.* by preventing the FCC from giving the states clear guidance as to how to implement the statute.

Finally, the issue is ripe for Supreme Court review. Because the case arises from an FCC rulemaking order interpreting its organic statute, it is unlikely that another federal court will have an opportunity to pass on this issue and correct the Fifth Circuit's ruling. Nor could another court create a "circuit split" that might become subject to review by the Supreme Court. For much the same reason, it is unlikely that there will be an opportunity to present this issue to the Supreme Court again for correction at a later date. Moreover, due to the immunities that state agencies enjoy under the Eleventh Amendment, it is unlikely that any federal court will have an opportunity to review a decision of a state regulatory commission implementing the statute. There is thus a narrow window of opportunity here to ensure the uniform application of federal law throughout the nation. Absent correction by the Supreme Court, there is a significant likelihood that states will be free to misinterpret Congressional intent and to undermine a Congressionally mandated federal program.

In conclusion, the Supreme Court should review this element of the Fifth Circuit's decision. The ETC designation process is critically important to facilitate competitive entry and create a competitive federal universal service program in which all carriers can participate regardless of the technology used. Allowing States indiscriminately to impose additional ETC criteria could unnecessarily delay the ETC designation process and impede entry by competitive carriers in rural/high-cost areas, contrary to the federal universal service program contemplated by the Act. Potential new entrants may forego competing for residential customers in rural areas because of the uncertainty and arbitrariness surrounding the ETC process and requirements. Experience to date shows that several state commissions have already displayed a willingness to deny ETC status to certain classes of carriers, such as commercial mobile radio service ("CMRS") providers. The Fifth Circuit holding is likely to embolden such states to deny ETC requests by creating new criteria and determining that they are not met.